96-653

NO. 96-953

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

KENNETH LEE BAKER, et al.,

Petitioners,

v.

GENERAL MOTORS CORPORATION,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the
Eighth Circuit

BRIEF OF AMICI CURIAE STATES OF MISSOURI, CONNECTICUT, IOWA, MISSISSIPPI, WASHINGTON, WISCONSIN AND THE COMMONWEALTH OF MASSACHUSETTS IN SUPPORT OF PETITIONERS BAKER, ET AL.

JEREMIAH W. (JAY) NIXON
Attorney General of the State of Missouri
*KAREN KING MITCHELL
Appellate Chief Counsel
P.O. Box 899
Jefferson City, MO 65102
Telephone: (573)-751-3321
**Counsel of Record*

(additional counsel listed on inside cover)

16 pp

RICHARD BLUMENTHAL
Attorney General
State of Connecticut

THOMAS J. MILLER
Attorney General
State of Iowa

MIKE MOORE
Attorney General
State of Mississippi

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

JAMES E. DOYLE
Attorney General
State of Wisconsin

SCOTT HARSHBARGER
Attorney General
Commonwealth of Massachusetts

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BRIEF *AMICI CURIAE* OF THE STATES OF MISSOURI, CONNECTICUT, IOWA, MISSISSIPPI, WASHINGTON, WISCONSIN AND THE COMMONWEALTH OF MASSACHUSETTS

INTEREST OF AMICI

The undersigned *amici curiae*, the Attorneys General of Missouri, Connecticut, Iowa, Mississippi, Washington, Wisconsin and the Commonwealth of Massachusetts, respectfully submit this brief in support of petitioners Kenneth Lee Baker and Steven Robert Baker, by his next friend, Melissa Thomas. *Amici* have a great and abiding interest in the Full Faith and Credit question currently before this Court.

As constitutional officers of the States they represent, *amici* have the responsibility to defend the values of federalism and to represent the interests of the citizens of their respective States. The decision under review violates rather than promotes the values of federalism. It threatens to undermine the proper enforcement of laws protecting public health, safety, and welfare. And it rests on a misinterpretation of Missouri public policy. Accordingly, the Eighth Circuit's judgment should be reversed.

SUMMARY OF ARGUMENT

I. The Eighth Circuit held that the Full Faith and Credit obligation prohibits a federal court in Missouri from admitting the testimony of a witness who was subject to a Michigan state-court decree enjoining him from testifying. But the petitioners here, plaintiffs in a Missouri federal court proceeding, were not parties or privies in the Michigan state court case and could not — consistent with due process — be bound by the Michigan judgment.

Far from serving the interests of federalism, the decision below threatens them by approving a constitutionally

impermissible interference with judicial proceedings outside Michigan. This interference impairs the interest of each State in the integrity of its own judicial proceedings by commanding the unwarranted exclusion of probative, non-privileged evidence solely as a result of a consent decree in a foreign jurisdiction.

II. If permitted to stand, the decision below would also pose a danger to the proper enforcement of laws protecting public safety. Under the court of appeals' approach, an accused wrongdoer could procure the nationwide silence of witnesses through the device of a consent decree, as GM did here. Moreover, the threat is not limited to private civil litigation; a wrongdoer could purchase the silence of witnesses in civil, administrative, or even criminal proceedings initiated by a State or by a federal agency.

III. The court of appeals premised its decision on a misunderstanding of Missouri public policy. The Eighth Circuit concluded that the Michigan injunction was entitled to Full Faith and Credit because "Missouri public policy embraces the theory of full faith and credit." Cert. App. 14a. It is *not* consistent with Missouri public policy, however, to bind an absent party to a judgment and to deny the public its right to every man's evidence. Missouri public policy lends no support to the decision below.

ARGUMENT

I. THE DECISION BELOW MISINTERPRETS PRINCIPLES OF FEDERALISM AND DUE PROCESS

Due process guarantees that a person "is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Martin v. Wilks*, 490 U.S. 755, 761-62 (1989); *see also Richards v. Jefferson Cnty.*, 116 S. Ct. 1761, 1765-66 (1996); *Hansberry v. Lee*, 311 U.S. 32, 40 (1940).

Yet here the Eighth Circuit held that the plaintiffs could not call a former GM employee as a witness because of a Michigan state court judgment rendered in a proceeding of which the plaintiffs had no notice, in which they did not participate and in which they were not represented in a class action or any other capacity. The Eighth Circuit erred in reading the Full Faith and Credit obligation as compelling such a result. The principles of cooperative federalism embodied in the Full Faith and Credit Clause, Art. IV, §1, and in the Full Faith and Credit statute, 28 U.S.C. § 1738, cannot and do not override fundamental due process guarantees.

The Full Faith and Credit Clause "substituted a command for the earlier principles of comity." *Estin v. Estin*, 334 U.S. 541, 546 (1948). But "[a] state-court judgment generally is not entitled to full faith and credit unless it satisfies the requirements of the Fourteenth Amendment's Due Process Clause." *Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873, 884-85 (1996) (Ginsburg, J., concurring in part and dissenting in part). This Court has explained that, in order for a judgment to be entitled to claim full faith and credit,

> [t]he State must . . . satisfy the applicable requirements of the Due Process Clause. A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment. Section 1738 does not suggest otherwise; other state and federal courts would still be providing a state court judgment with the "same" preclusive effect as the courts of the State from which the judgment emerged. In such a case, there could be no constitutionally recognizable preclusion at all.

Kremer v. Chemical Constr. Corp., 456 U.S. 461, 482-83 (1982).

Thus, the Full Faith and Credit obligation has always been understood to be "subject to the requirements of" due process. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985). *See also Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 523 (1986) (quoting *Marrese*); *McDonald v. Mabee*, 243 U.S. 90, 92 (1917) ("[A]n ordinary personal judgment for money, invalid for want of service amounting to due process of law, is as ineffective in the State as it is outside of it").

There is no reason to depart from this settled principle here. The values of cooperative federalism and comity embodied in the Full Faith and Credit Clause and statute does not permit that a judgment be binding against a nonparty unrepresented in the previous action. To the contrary: "Both the Due Process and Full Faith and Credit Clauses ensure that the States do not 'reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.'" *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 334 (1981) (Powell, J., dissenting, joined by Burger, C.J., and Rehnquist, now C.J.) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

Thus, the decision below positively *disserves* the values of federalism by sanctioning an unwarranted inference with judicial proceedings outside Michigan. Although in this case the issue arose in a federal district court, the Full Faith and Credit Clause applies equally to state courts. If the Eighth Circuit's analysis is accepted, this limitation on evidence would be applied in the future in state court actions. Each State has a fundamental interest in the integrity of its judicial proceedings. The exclusion of probative, non-privileged evidence solely as a result of a consent decree in a foreign jurisdiction impairs the search for truth and creates too great a risk that the State's own

judicial processes might be used as an instrument of injustice. As one court reasoned in permitting the testimony of Ronald Elwell — the former GM employee involved in this case — the Michigan injunction "prevents the jury from making a determination based upon all the relevant, admissible evidence. The effect is an obscured search for truth." *Hannah v. General Motors Corp.*, No. Civ. 93-1368 PHX RCB, slip op. at 5 (D. Ariz. May 30, 1996). Another court concluded that the injunction "not only violates our fundamental public policy against suppression of evidence," but also "would undermine the fundamental integrity of this state's judicial system." *Smith v. Superior Court*, 49 Cal. Rptr. 2d 20, 27 (Cal. App. 5th Dist. 1996), *review denied*, 1996 Cal. LEXIS 2185 (Cal. Apr. 18, 1996).

In the ordinary case, states have an important interest in the extraterritorial recognition of their judgments by sister states. This interest is reflected in Art. IV, § 1 and 28 U.S.C. § 1738. The instant controversy, however, is not an ordinary case. Here, countervailing interests — including fundamental principles of both due process and federalism — show that the Michigan injunction at issue was not entitled to Full Faith and Credit.

II. THE DECISION BELOW REPRESENTS A DANGER TO THE PROPER ENFORCEMENT OF STATE LAWS PROTECTING PUBLIC HEALTH, SAFETY, AND WELFARE

The Eighth Circuit held that, under the Full Faith and Credit obligation, the Michigan state court injunction precludes petitioners from obtaining Mr. Elwell's testimony in a federal court in Missouri. This decision, if permitted to stand, would give wrongdoers a simple guide to hampering or even effectively preventing litigation against them: by procuring the

silence of adverse witnesses through consensual or contested injunctions before a judge in a chosen locale. Any wrongdoer could duplicate GM's strategy.

The underlying decision poses a particular threat to state law enforcement efforts. Employees and company insiders frequently provide critical information in environmental, anti-trust, consumer protection, medicaid fraud and many other kinds of state investigations. GM's brief in opposition to certiorari provides one example of how Full Faith and Credit can be used to limit state law enforcement efforts. GM pointed to tobacco litigation and the efforts of Brown & Williamson to enforce a Kentucky state court injunction against Jeffrey Wigand, a former vice president for research & development at Brown Williamson. The tobacco company sought to prevent Mr. Wigand from testifying in a lawsuit brought by the State of Mississippi in Mississippi state court.

Further examples highlight the extent of the danger posed by the decision below. In *EEOC v. Astra USA, Inc.*, 94 F.3d 738 (1st Cir. 1996), for instance, the First Circuit invalidated a provision of an employment discrimination settlement in which the plaintiff agreed not to cooperate with the EEOC's sexual harassment investigation involving other employees. The court explained that, when approached by the EEOC, the plaintiff stated "that she possessed relevant information but was unable to disclose it 'due to a confidential settlement agreement that she had entered into with Astra.'" *Id.* at 741. "[W]hen the EEOC contacted ninety employees and requested information, only twenty-six replied." *Id.* The court explained that such provisions in settlements were void as against public policy:

> Clearly, if victims of or witnesses to sexual harassment are unable to approach the EEOC or even to answer its questions, the investigatory powers that Congress conferred would be sharply curtailed and the efficacy of

> investigations would be severely hampered. . . . In many cases of widespread discrimination, victims suffer in silence. In such instances, a sprinkling of settlement agreements that contain stipulations prohibiting cooperation with the EEOC could effectively thwart an agency investigation.

Id. at 744. The court added that the right to provide truthful information to the EEOC "is not a right that an employer can purchase from an employee, nor is it a right that an employee can sell to her employer." *Id.* at 744 n.5.

Similarly, in *Hamad v. Graphic Arts Center, Inc.*, 72 Fair Empl. Prac. Cases (BNA) 1759 (D. Or. Jan. 3, 1997), a district court refused to enforce a secrecy provision in a settlement agreement between a company and a former employee when the latter was called to testify in a racial discrimination case. The court explained that "any provision in the settlement agreement which prohibits [the former employee] from testifying as required by the subpoena are against public policy and therefore void."

The logic of *Astra* and *Hamad* is squarely applicable here. Yet under the Eighth Circuit's approach, the non-cooperation agreements in *Astra* and *Hamad* would have been binding if they had been memorialized in a consent decree, like the agreement between Elwell and GM. Unless the decision below is reversed, in the future wrongdoers will evade holdings like *Astra* and *Hamad* by including noncooperation agreements in consent decrees before friendly courts.

The danger posed by the Eighth Circuit decision is most obvious in cases involving former and current employees, but its effect is not limited to those situations. Unless the Eighth Circuit's decision is corrected, there is every reason to think that wrongdoers would begin to negotiate secrecy agreements

involving third-party witnesses.

In short, the threat to the public welfare is plain. The Eighth Circuit's decision should not be permitted to stand.

III. THE DECISION BELOW MISCONSTRUES MISSOURI PUBLIC POLICY

The Eighth Circuit premised its decision on the view that "Missouri public policy embraces the theory of full faith and credit." Cert. App. 14a. But the court of appeals failed to consider the matter in context. Although Missouri has adopted the Uniform Enforcement of Foreign Judgments Act, *see* Mo. Rev. Stat. §§ 511.760, 511.778, Missouri law, of course, has long recognized — in accordance with the Federal Constitution — that courts may not give full faith and credit to judgments of sister state courts where those judgments are sought to be applied in violation of due process. "That which was done in violation of the due-process clause, is not entitled to be enforced under the full-faith-and-credit clause." *Hall v. Wilder Mfg. Co.*, 293 S.W. 760, 762 (Mo. 1927). *See, e.g., Fisk v. Wellsville Fire Brick Co.*, 152 S.W.2d 113, 118 (Mo. 1941) (Illinois judgment not entitled to full faith and credit where defendant did not enter an appearance and was not properly served in foreign action); *Adamson v. C.G. Harris*, 726 S.W.2d 475, 477 (Mo. Ct. App. 1987) ("'A judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere. . . . Due process requires that the defendant . . . be subject to the personal jurisdiction of the court . . . . '") (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

Thus, even a *party* to a prior proceeding may not be held to a full faith and credit obligation under the Missouri statute by demonstrating that it was not given "due notice" in the prior proceeding. *In re Veach*, 287 S.W.2d 753, 759 (Mo. 1956);

Bastian v. Tuttle, 606 S.W.2d 808, 809 (Mo. Ct. App. 1980); *Corning Truck & Radiator Service v. J.W.M., Inc.*, 542 S.W.2d 520, 524 (Mo. Ct. App. 1976); *see also Campbell v. Campbell*, 780 S.W.2d 89, 91 (Mo. Ct. App. 1989) ("Foreign judgments do not qualify for registration under Missouri's Uniform Act unless they are entitled to full faith and credit under the Full Faith and Credit Clause of the Federal Constitution. And, that Clause does not compel a state court to extend full faith and credit to the judgment of a sister state whose rendering court failed to give notice consistent with the procedural due process guaranteed by the Fourteenth Amendment of the Federal Constitution.") (citation omitted).

A fortiori, Missouri law and public policy recognize that a person who is not even a *party* in the prior proceeding cannot be bound by the foreign judgment.

Further, Missouri recognizes the important public policy interest in the disclosure of all relevant, non-privileged information. Under Missouri law, a party should be provided "with access to anything that is 'relevant' to the proceedings and subject matter not protected by privilege." *State v. Koehr*, 831 S.W.2d 926, 927 (Mo. 1992) (en banc). Missouri Rule of Civil Procedure 56.01(b)(1) provides that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action."

Missouri is not alone in recognizing that the state has a strong public policy interest in the disclosure of relevant, non-privileged information. Numerous lower courts have permitted Mr. Elwell to testify as to non-privileged, non-trade-secrets information within his knowledge, on the ground that the public policy of full discovery and disclosure demands such a result. *See, e.g., Ake v. General Motors Corp.*, 942 F. Supp. 869, 881 (W.D.N.Y. 1996) (specifically declining to follow the Eighth

Circuit's decision for this reason); *Williams v. General Motors Corp.*, 147 F.R.D. 270, 273 (S.D. Ga. 1993) ("This Court concludes that the public interest — which must be weighed in any consideration of injunctive relief — is not served in this instance by prohibiting Elwell from testifying in Georgia as to matters not within the scope of an attorney-client or work-product privilege, or which divulgence would not constitute misappropriation of a trade secret. Any interest GM might have in silencing Elwell as to unprivileged or non-trade-secret information is outweighed by the public interest in full and fair discovery."); *Bishop v. General Motors Corp.*, No. 94-286-S, slip op. 2 (E.D. Okla. June 29, 1994) ("to the extent the Michigan injunction prohibits Elwell from testifying to matters outside the scope of any privilege, or with respect to trade secrets, it violates Oklahoma and federal court public policy of full discovery"); *Ruskin v. General Motors Corp.*, No. CV930073883, 1995 WL 41399, *2 (Conn. Super. Ct.) (Jan. 25, 1995) ("the Michigan injunction involves a blanket prohibition that contravenes Connecticut public policy"); *Kibler v. General Motors Corp.*, No. C94-1494R, slip op. 2 (W.D. Wash. July 10, 1996) (noting "Washington's strong public policy in favor of full disclosure in the search for truth at trial").

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed insofar as it held that the Full Faith and Credit obligation prevented Ronald Elwell from testifying in this case.

Respectfully submitted.

JEREMIAH W. (JAY) NIXON
Attorney General

KAREN KING MITCHELL
Counsel of Record
Appellate Chief Counsel
P. O. Box 899
Jefferson City, Missouri 65102
(573) 751-3321

Attorneys for Amici Curiae

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